

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

Verisign, Inc.,

Plaintiff,

v.

XYZ.com, LLC et al.,

Defendants.

Civil Action No. 1:14-cv-01749 CMH-MSN

**MOTION IN LIMINE NUMBER 1 AND MEMORANDUM IN SUPPORT TO
EXCLUDE WITNESSES NOT DISCLOSED IN DISCOVERY**

Verisign seeks to call five witnesses that were not disclosed during the discovery process. Those witness should be excluded.

1. On August 20, 2015, Verisign filed its list of trial witnesses. (Dkt. No. 218.) That list names the following witnesses:

- a. Craig Snyder
- b. Mrinal Sign
- c. Representative of .CLUB
- d. Joseph Waldron
- e. Michael Crews Gore

2. None of these witnesses were disclosed at any point in the discovery process. Fed.R.Civ.P. 26(a)(1)(A)(i) and (3) mandates that Verisign disclose each witness and the subjects of testimony in its initial disclosures. Verisign had an ongoing duty to timely supplement its Rule 26(a) disclosures. Fed.R.Civ.P. 26(e)(1)(A).

3. Rule 37(c)(1) addresses the failure to make a disclosure under Rule 26 and provides that “[i]f a party fails to ... identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that ... witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed.R.Civ.P. 37(c)(1). In deciding whether nondisclosure of a witness is substantially justified or harmless, a court should consider the following factors: (1) the surprise to the party against whom the witness was to have testified; (2) the ability of the party to cure that surprise; (3) the extent to which allowing the testimony would disrupt the trial; (4) the explanation for the party’s failure to name the witness before trial; and (5) the importance of the testimony. *S. States Rack & Fixture v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir.2003).

4. This Court’s scheduling order bolsters Rule 26 and 37’s requirements. The Court

mandated that “no person may testify whose identity, being subject to disclosure or timely requested in discovery, was not disclosed in time to be deposed or to permit the substance of his knowledge and opinions to be ascertained.” (Dkt. No. 24.)

5. Each factor in the *S. States Rack* test favors exclusion. *S. States Rack*, 318 F.3d at 596. XYZ was completely surprised by these new witnesses, and has no opportunity to cure because discovery closed before they were disclosed. Trial would be substantially disrupted by a continuance at this late stage. Verisign presents no explanation for why these witnesses were not timely disclosed, nor has Verisign presented any proof that their testimony is important to the case. They should be excluded.

XYZ respectfully requests that the Court grant its Motion in Limine No. 1.

Dated October 23, 2015.

Respectfully Submitted,

/s/

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7(E)

Undersigned counsel hereby certifies that they have consulted with opposing counsel by telephone and have made a good faith effort to narrow the area of disagreement. As of the time of filing this Motion, they have been unable to reach agreement. XYZ will notify the Court if the parties reach an agreement to resolve the matters raised in this Motion.

Dated October 23, 2015.

/s/

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CERTIFICATE OF SERVICE

I certify that on October 23, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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